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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	
Regulations Governing Television	)	MM Docket No. 91-221
Broadcasting: Television Satellite	)	MM Docket No. 87-8
Stations Review of Policy and Rules	)	

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MAY - 6 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REQUEST OF EMMIS COMMUNICATIONS CORPORATION FOR INTERIM RELIEF

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REQUEST OF EMMIS COMMUNICATIONS CORPORATION FOR INTERIM RELIEF

On February 19, 2002, the U.S. Court of Appeals for the D.C. Circuit issued a ruling finding that the Commission had applied "too low a standard" of review in conducting its mandatory biennial review of media ownership regulations.[1] Based in large part on this finding, on April 2, 2002 the D.C. Circuit issued an opinion holding that the Commission had failed to adequately support its decision to retain portions of its duopoly rule and remanded the rule to the Commission for further proceedings.[2] In light of these rulings and the impending 2002 biennial review proceeding,[3] and pursuant to Section 1.41 of the Commission's rules,[4] Emmis

[1] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002) ("*Fox*").

[2] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

[3] Section 202(h) of the of the Telecommunications Act of 1996 requires that the Commission conduct a biennial review of all of its ownership rules every two years. The next biennial review is required to be initiated by the end of this year. Pub. L. No. 104-104, § 202(h), Stat. 56 (1996) ("*1996 Act*").

[4] *FCC Practice and Procedure*, 47 CFR § 1.41 (2001).

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Communications Corporation[5] ("Emmis") respectfully requests that the Commission extend the time for the company to come into compliance with the duopoly rule[6] until 12 months after a final decision[7] by the FCC on remand from the D.C. Circuit's recent decision in *Sinclair v. FCC* and a final order in the Commission's 2002 biennial review proceeding. Such interim relief would merely preserve the *status quo* while the Commission complies with the remand ordered by the court and fulfills its statutory responsibility under Section 202(h) of the Telecommunications Act of 1996.[8]

I. SUMMARY

In light of the court-ordered remand in *Sinclair* and the statutorily required 2002 biennial review proceeding, it is a legal certainty that the Commission will review its television duopoly

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5 Emmis Communications Corporation is the ultimate corporate parent of Emmis Television License Corporation, licensee of "stand-alone" stations KHON-TV, Honolulu, HI and KGMB(TV), Honolulu, HI and "satellite" stations KGMV(TV), Wailuku, HI; KAII(TV), Wailuku, HI; KGMD(TV), Hilo, HI; and KHAW(TV), Hilo, Hawaii.

6 Emmis currently owns and operates two television broadcast stations, as well as the stations' respective satellites, in the Honolulu, Hawaii market (a television duopoly) subject to a temporary waiver. Emmis has requested a one-year extension of that waiver. The Media Bureau is currently reviewing additional information in support of that request, which Emmis provided at the Commission's request. Pending the Bureau's review, it has extended the waiver through July 1, 2002. *See* Letter from Gary Kaseff, Executive Vice President and General Counsel, Emmis Communications Corporation, to Roy J. Stewart, Esq., Chief, Office of Broadcast License Policy, Media Bureau (Apr. 26, 2002) (filed with the Commission on Apr. 29, 2002) ("*April Response Letter*"); Letter from Roy J. Stewart, Chief, Office of Broadcast License Policy, Media Bureau, to Emmis Communications Corporation, c/o John E. Fiorini, III (Mar. 28, 2002) ("*March 28 Letter*").

7 Emmis respectfully requests that any stay issued by the Commission continue until the Commission's actions on remand in response to the *Sinclair* decision and its 2002 biennial review both become final. Emmis submits that the term "final" should be construed to mean that final action has been taken by the FCC in these dockets and that the decisions are no longer subject to judicial review. This is the temporal scope of the stay granted by the Commission to similarly situated broadcast owners. *See, e.g., 1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 02-98, 2002 Lexis 1594 (Mar. 6, 2002) (Memorandum Opinion and Order) ("*Viacom Order*").

8 Emmis further requests that the Commission extend the time for divestiture for at least sixty (60) days from any Commission order denying interim relief. This will allow Emmis to seek interim relief from the U.S. Court of Appeals for the D.C. Circuit. Obviously, Emmis must take costly, and in some cases, irreversible actions prior to filing a divestiture application with the Commission. An extension of at least 60 days from any denial of this petition will allow both Emmis and the FCC time for an orderly presentation to the court.

rule[9] this year. Given the strict requirements set forth by the D.C. Circuit for the Commission's resolution of its impending biennial review proceeding, the FCC will be required to repeal (or at the very least significantly modify) the duopoly rule. Even under the standard proposed by the Commission in its petition for rehearing in the *Fox* case, the agency would be required to conduct a *de novo* inquiry into whether the duopoly rule serves the public interest given prevailing conditions in the broadcast market today.[10] Thus, because the rules that require Emmis' divestiture are under review and likely to change, and because the divestiture cannot be undone, Emmis respectfully requests that the Commission grant its petition for interim relief.

The four factors to be taken into account for interim relief pending review are: (1) the threat of irreparable harm to the petitioner absent interim relief; (2) the likelihood that the petitioner will succeed or prevail on appeal; (3) the harm to other parties from the granting of interim relief; and (4) the harm to the public interest. The circumstances here satisfy all of these criteria.

First, denial of interim relief would inflict irreparable injury on Emmis by causing the company to lose a unique and irreplaceable asset. In the absence of the relief requested, Emmis would have to promptly divest its ownership of a television station serving the Honolulu Designated Market Area ("DMA"), which represents over a quarter of a million television households. If the rule is ultimately repealed or modified, there is very little chance that Emmis

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9 The duopoly rule prohibits common ownership of two television stations in the same Designated Market Area whose Grade B contours overlap if: (1) both stations are ranked among the top four stations in the market (top-four component); or (2) there are less than eight independently owned television stations in the market (voice-count test). *FCC Radio Broadcast Services*, 47 CFR § 73.3555(b) (2001).

10 Moreover, the Commission's pending Petition for Rehearing or Rehearing *En Banc* does not challenge that portion of the *Fox* opinion followed in *Sinclair*, which holds that there is a presumption in favor of repeal arising from other language in Section 202(h). *See Petition for Rehearing or Rehearing En Banc* for Respondents FCC and The United States, in the United States District Court of Appeals, Nos. 00-1222, *et. al* (filed Apr. 19, 2002) ("*FCC Rehearing Petition*").

could re-purchase this facility, or any other equivalent facility in the same market, in the future. The Commission has recognized that individual television stations are highly unique properties, with distinctive technical characteristics—and differing audiences that are carefully cultivated. For these and other reasons, adequate compensatory or other corrective relief for the harm caused by such divestiture would not be available after the Commission has repealed the rule.

Second, there is a substantial likelihood that the Commission (or a reviewing court) will repeal or modify the duopoly rule. In its *Fox* decision, the D.C. Circuit held that the biennial review requirement in the Telecommunications Act of 1996 "carries with it a presumption in favor of repealing or modifying the ownership rules."[11] Accordingly, pending completion of the FCC's 2002 biennial review proceeding, it must be presumed as a matter of law that the rule will be repealed or substantially modified.[12] In the instant case, this presumption is solidified by the D.C. Circuit's recent determination in *Sinclair* that the reasoning in the *1999 Local Television Ownership Order* is insufficient to retain the duopoly rule in its current form. In *Sinclair*, the D.C. Circuit remanded the television duopoly rule, finding that the Commission improperly looked solely to television stations to define media "voices" in a market. As with the portion of the rule challenged in *Sinclair*, the top-four component of the duopoly rule improperly limits its view of audience share to television stations without looking at the larger media marketplace or the diverse outlets in the affected market. Without sufficient justification to retain the ownership cap, the Commission must act on remand or in the 2002 biennial review proceeding to repeal or modify the rule.

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11 *Fox*, 280 F.3d at 1048.

12 Even under the alternative formulation suggested by the Commission in its Petition for Rehearing in *Fox*, *i.e.*, a *de novo* assessment of whether the rule continues to serve the public interest, Emmis submits that elimination or substantial alteration of the duopoly rule is likely. *See FCC Rehearing Petition*, at 9.

Turning to the third interim relief factor, no interested party would suffer substantial harm from the grant of interim relief. In fact, the temporary relief requested would not cause any cognizable harm to other parties, including viewers and competitors.

Finally, a grant of interim relief would not be adverse to the public interest. This relief would merely permit maintenance of the *status quo* for a limited period of time—under the management of a company that has a long record of exemplary service in the public interest.

Granting Emmis' request for interim relief also will provide parity with other parties that have sought similar relief.[13] Accordingly, the Commission should promptly grant Emmis' request for interim relief to maintain the *status quo* while the FCC completes its proceeding on remand from the D.C. Circuit and its 2002 biennial review proceeding.

II. BACKGROUND

A. History of the Television Duopoly Rule

In 1964, the FCC promulgated a rule prohibiting the common ownership of two television stations with overlapping "Grade B" contours.[14] The adoption of the television duopoly rule was based on the Commission's stated policy goals of "promot[ing] maximum diversification of program and service viewpoints" and "prevent[ing] undue concentration of

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[13] For example, Viacom recently received similar interim relief from a requirement to come into compliance with the national ownership cap pending review of the rule on remand. *Viacom Order*, FCC 02-98, 2002 Lexis 1594. Obviously, the agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways." *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (citing *Burinskas v. NLRB*, 357 F.2d 822, 827 (1966)). Both Viacom and Emmis were under divestiture orders pursuant to FCC rules that have been remanded by the D.C. Circuit and are subject to the 2002 biennial review under the *Fox* standard. "[O]nce an agency agrees to allow exceptions to a rule, it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar." *Green Country MobilePhone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985).

[14] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, FCC 64-904 (Sept. 30, 1964) (Memorandum Opinion and Order) ("*1964 Multiple Ownership Order*"). The Commission in 1938 had established a presumption against granting a second license to any existing licensee in the same community. *Genesee Radio Corp.*, 5 FCC 183 (1938). In 1941, the agency implemented a rule precluding radio networks from owning more than one station in a given community. *National Broad. Co. v. United States*, 319 U.S. 190 (1943) (upholding the restriction). The adoption of the duopoly rule in 1964 standardized the Commission's prior *ad hoc* approach to duopolies.

economic power."[15] However, in its Order establishing the restriction, the Commission acknowledged that it had no empirical evidence substantiating its theory that the rule would accomplish these objectives, stating that it was "not necessary" to fulfill commenters' call for the agency "to compile a substantial record of tangible harm" before adopting the standard.[16]

In 1991, prompted by a "general concern that some of [its] television ownership rules and policies may no longer be in step with current industry circumstances," the Commission initiated a proceeding to reexamine its broadcast ownership restrictions.[17] In a *Notice of Inquiry* ("*NOI*") soliciting comment on whether the existing rules should be modified, the Commission emphasized that "television broadcasting now exists in an environment significantly more competitive than in years past and likely to be even more competitive in the years ahead."[18] Based on the comments received in response to the *NOI*, the Commission issued a *Notice of Proposed Rulemaking* ("*NPRM*") the following year containing a number of alternative proposals for relaxing its ownership rules, including the restriction on television duopolies.[19] Because of continuing dramatic growth and competitive developments in the media marketplace, the FCC issued a *Further Notice of Proposed Rulemaking* in its local television ownership

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15 *1964 Multiple Ownership Order*, ¶ 2.

16 *Id.* at ¶ 15.

17 *Review of the Policy Implications of the Changing Video Marketplace,* 6 FCC Rcd 4961, 4961 (1991) (Notice of Inquiry).

18 *Id.*

19 *Review of the Commission's Regulations Governing Television Broadcasting,* 7 FCC Rcd 4111 (1992) (Notice of Proposed Rulemaking).

proceeding in 1994 that was primarily aimed at "analyz[ing] the extent to which [the] TV ownership rules should explicitly take into account the existence of other competing media."[20]

While that proceeding was still pending, Congress imposed sweeping changes on the FCC's regulation of broadcast ownership through the enactment of the Telecommunications Act of 1996 ("1996 Act").[21] Section 202(h) of the Act directed the Commission to " review . . . all of its ownership rules biennially" and to "determine whether any of such rules are necessary in the public interest as the result of competition."[22] The agency was further required as part of its biennial review to "repeal or modify any rule it determines to be no longer in the public interest."[23] With respect to the television duopoly rule, the Commission was specifically instructed to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" the restriction.[24] In view of the directives of the 1996 Act, the Commission issued yet another *NPRM* in its television ownership proceeding.[25]

Three years later, in August of 1999, the Commission issued its *Local Television Ownership Order*, in which it adopted the current form of the television duopoly rule.[26] Recognizing that the "demonstrated benefits of same-market television station combinations support allowing the formation of such combinations in certain cases," the agency narrowed the

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20 *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524, 3531 (1995) (Further Notice of Proposed Rulemaking).

21 Pub. L. No. 104-104, § 202(h), Stat. 56 (1996) ("*1996 Act*").

22 *Id.* § 202(h).

23 *Id.*

24 *Id.* § 202(c)(2).

25 *Review of the Commission's Regulations Governing Television Broadcasting*, 11 FCC Rcd 21655 (1996) (Second Further Notice of Proposed Rulemaking).

26 *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999) (Report and Order) ("*Local Television Ownership Order*").

geographic scope of the rule and adopted a two-pronged modification "targeted to promote the public interest without appreciable harm to our competition and diversity goals."[27] Specifically, the agency decided to allow common ownership of two television stations with overlapping Grade B contours and within the same DMA[28] if (1) eight operating, independently owned-and-operated, full-power commercial and noncommercial television stations will remain in the DMA post-merger; and (2) the two merging stations are not both among the top-four ranked stations in the market, as measured by audience share, at the time the application is filed with the Commission.[29]

The Commission offered no explanation of how the selection of the number eight under the "eight voice" component of the rule was designed to protect the agency's diversity and competition interests. Rather, the agency simply stated that the standard "strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity."[30] In justifying its choice to include only same-market television stations as "voices" under the rule, the FCC offered two rationalizations. First, the agency stated its belief that "broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."[31]

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27 *Id.* at 12930.

28 The Commission narrowed the relevant geographic market for purposes of the rule by permitting common ownership of two stations if they are in different DMAs without regard to contour overlap. *Id.* at 12926. As was the case under the prior version of the rule, parties also can co-own two stations in the same DMA so long as the Grade B contours of the stations do not overlap. *Id.* at 12928.

29 *Id.* at 12930-31.

30 *Local Television Ownership Order*, at 12934.

31 *Id.* at 12933.

Second, the Commission stated that it was unable to reach a "definitive conclusion" regarding the extent to which other media serve as readily available substitutes for television.[32]

The agency defended the "top-four ranked station" component by stating that the standard was "designed to ensure that the largest stations in the market do not combine and create potential competition concerns."[33] The Commission also asserted—without providing any independent evidence—that the top-four ranked stations in each market generally have a local newscast, whereas lower ranked stations often do not have significant news programming.[34]

In the same Order in which it implemented these changes to the duopoly standard, the Commission also modified its television/radio cross-ownership rule (also known as the "one-to-a-market" rule), which imposes restrictions on the common ownership of radio and television stations within a local market.[35] Similar to its approach to television duopolies, the agency adopted a standard permitting cross-ownership so long as a minimum number of independently owned "voices" would remain in the market post-merger.[36] In contrast to the duopoly rule, however, the Commission decided to count as "voices" not only independently owned and operating television stations, but also (1) all independently owned and operating broadcast radio stations licensed to a community within the relevant radio metro market; (2) independently owned daily newspapers published in the DMA with a circulation exceeding 5 percent of the

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[32] *Id.*

[33] *Id.* at 12933.

[34] *Id.*

[35] 47 C.F.R. § 73.3555.

[36] *Local Television Ownership Order*, at 12950.

households in the DMA; and (3) cable service, provided that it is generally available in the DMA.[37]

In addition, again in contrast to the standard imposed for duopolies, no separate audience share or market rank component was incorporated into the modified one-to-a-market rule. Indeed, the revised cross-ownership rule permits a single licensee to own as many as six radio and two television stations—or, alternatively, one television and seven radio stations—in the largest markets without regard to the audience share or rank of the radio outlets. Similarly, a single party can own up to two television and four radio stations in any market, again regardless of the market rank of the radio stations, where at least ten independently owned media voices will remain post-merger.[38] Nowhere in the Order did the Commission explain these apparent inconsistencies between the duopoly and the one-to-a-market rules.

B. <u>Emmis Duopoly Status</u>

Emmis currently owns and operates two television stations, as well as the stations' respective satellites, in the Honolulu, Hawaii DMA pursuant to a temporary waiver of the duopoly rule that will expire on July 1, 2002. As part of a multi-station transaction between Emmis and Lee Enterprises Incorporated approved by the Commission in September of 2000,[39] Emmis acquired station KGMB(TV), Honolulu, Hawaii and the station's two satellites. At the time of this acquisition, Emmis already owned KHON-TV and its two satellite stations in the Honolulu DMA. Although there were more than eight independently owned and operated stations in the Honolulu DMA, Emmis' joint ownership of KGMB(TV) and KHON-TV

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37 *Id.* at 12908-09.

38 *Id.* at 12947.

39 *Applications of LINT Co. and Emmis Television License Corporation of Honolulu*, 15 FCC Rcd 18130 (2000) (Memorandum Opinion and Order).

implicated the television duopoly rule because the stations' Grade B signal contours overlap and both stations are ranked among the top four in the Honolulu market based on audience share.

Accordingly, Emmis requested, and the Commission granted, a period of six months from consummation to come into compliance with the rule.[40] In two subsequent letter rulings, the Commission extended the compliance deadline until April 1, 2002.[41] In February of 2002, Emmis filed a request with the Commission for an additional extension of the divestiture obligation.[42] In response, the Commission sent a letter to Emmis on March 28, 2002 requesting additional information concerning Emmis' compliance efforts and extending the divestiture deadline for 90 days in order to allow sufficient time for Emmis to comply with the request and for the Commission to review the additional information.[43] As directed in the letter, Emmis submitted a reply to the information request on April 26, 2002.[44]

The Commission has recognized that Emmis has made good faith efforts to meet its divestiture obligation in the Honolulu market but thus far has been unsuccessful due to a variety of both general and market-specific factors.[45] Since the fall of 2000, Emmis has been working continuously with a media broker to find a suitable purchaser for one of its Honolulu stations. While the broker has targeted and made contact with a number of potential purchasers both in the

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40 *Id.* at 18133.

41 Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Emmis Communications Corporation, c/o James R. Bayes (Mar. 23, 2001) ("*March Ruling*"); Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Emmis Communications Corporation, c/o James R. Bayes (Sept. 19, 2001) ("*September Ruling*").

42 Letter from Randall D. Bongarten, President, Emmis Television, to Roy J. Stewart, Chief, Mass Media Bureau (Feb. 13, 2002) (filed with the Commission on Feb. 14, 2002).

43 *March 28 Letter.*

44 *April Response Letter.*

45 *See, e.g., March Ruling*; *September Ruling.*

general broadcasting community and among Hawaiian and west-coast investors and businesses, the vast majority either have not responded to the broker's solicitations or have indicated that they have no interest in the opportunity to buy one of the stations. Although the broker continues in the efforts to find an appropriate buyer, it is anticipated that the prospects for selling one of the stations will not significantly improve in the near future.

C. The *Fox* and *Sinclair* Decisions

Since Emmis filed its most recent extension request with the Commission on February 14, 2002, the future of the duopoly rule has been thrown into question by two important decisions of the United States Court of Appeals for the D.C. Circuit. In *Fox Television Stations, Inc. v. FCC*, issued on February 19, 2002, the court remanded to the Commission its rule restricting the audience size that a single television licensee can reach nationwide and vacated the agency's prohibition on cross-ownership of a television station and a cable system in the same local market.[46] Largely relying on its reasoning in the *Fox* case, the court remanded the television duopoly rule to the agency just a few weeks later in *Sinclair Broadcast Group, Inc. v. FCC*.[47]

In *Fox*, the court found that the FCC had failed in its 1998 biennial review proceeding to provide an adequate justification for retention of either its national television station ownership cap or the cable/television cross-ownership rule. In reaching this conclusion, the court determined that the biennial review provision of the 1996 Act places a high burden of review on the agency that "carries with it a presumption in favor of repealing or modifying [its] ownership

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46 *Fox*, 280 F.3d 1027.

47 *Sinclair*, 284 F.3d 148.

rules."[48] The court further held that "[t]he statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."[49]

In *Sinclair*, the court reiterated its prior finding that the biennial review mandate was "designed to continue the process of deregulation" and limit the agency's authority to retaining rules that are "necessary" to serve the public interest.[50] Agreeing with the petitioner's contention that the FCC had not provided any justification for counting fewer types of voices under the duopoly rule than it does with respect to the one-to-a-market rule, the court remanded the duopoly rule to the agency on that ground. Specifically, the court found that "notwithstanding the substantial deference to be accorded to the Commission's line drawing, the Commission cannot escape the requirements that its actions not run counter to the evidence before it and that it provide a reasoned explanation for its action."[51] Although the petitioner also challenged the FCC's choice of the number eight under the rule's voice-count test, the court noted that it was not necessary to reach that issue in its decision; the court did, however, expressly invite the agency to reexamine that aspect of the voices test as part of the remand proceeding.[52]

The FCC has acknowledged that the court's interpretation of the biennial review mandate has placed the future viability of the ownership rules in jeopardy. Chairman Powell has described the *Fox* ruling as a "monumental case" and has stated that "[i]t will be difficult and challenging to develop the persuasive justification that the court appears to be requiring for

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48 *Fox*, 280 F.3d at 1048.

49 *Id.* at 1050.

50 *Sinclair*, 284 F.3d at 159.

51 *Id.* at 162 (Internal quotations omitted).

52 *Id.*

ownership rules."[53] Similarly, in its Petition for Rehearing or Rehearing *En Banc* in the *Fox* case, the Commission asserts that the holding "imposes a substantial and continuing burden on the agency" and "can be read to require a higher standard to retain an existing rule than to adopt it in the first instance."[54]

Pursuant to both the *Sinclair* decision and the biennial review obligation, the Commission is required to reevaluate the duopoly rule in the near future. The 1996 Act requires agency review of the entire rule in 2002. Notably, the Commission has not considered the duopoly restriction in any of its prior biennial review proceedings. In light of the D.C. Circuit's remand of the duopoly rule as well as the impending biennial review proceeding, Emmis respectfully requests that the Commission suspend the time for it to come into compliance with the duopoly rule in the Honolulu market until the agency's review of the restriction is completed.

III. ARGUMENT

The Commission is under both a judicial order and a statutory directive to begin reconsidering the duopoly rule by the end of this year. Under the standard recently announced in *Fox*, it must be presumed (until there is an authoritative determination to the contrary) that the rule will be found to be no longer "necessary in the public interest." Even under the more relaxed standard advocated by the Commission in its petition for rehearing in *Fox*,[55] elimination or substantial alteration of the duopoly rule is highly likely. Accordingly, the Commission should grant Emmis interim relief in order to maintain the *status quo* during its consideration of those proceedings, thereby preserving the final relief to which Emmis is presumptively entitled.

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53 Doug Halonen, *Broadcast Rules Could Come Tumbling Down; Court Decision May Signal Avalanche of Media Deregulation*, Electronic Media, Feb. 25, 2002 at 21; Jube Shiver, Jr., *FCC To Rethink Media Rules*, L.A. Times, Feb. 21, 2002, at Business Sec., Part 3, p. 2.

54 *FCC Rehearing Petition*, at 2.

55 *Id.* at 9.

Indeed, as demonstrated below, each of the factors considered in deciding whether to grant interim relief[56] weighs in favor of a grant of the extension requested herein. These factors are: (1) the threat of irreparable harm to the moving party absent interim relief; (2) the likelihood that the moving party will succeed or prevail; (3) the harm to other parties from the grant of interim relief; and (4) any harm to the public interest.[57]

A. <u>Emmis Would Suffer Irreparable Injury if Interim Relief Were Denied</u>

A denial of interim relief will force Emmis to divest one of its stations in the Honolulu DMA and lose a unique voice in that market. Emmis would be required to sell this scarce asset, valued in the millions of dollars, at "fire sale" prices.[58] Neither a court nor the Commission would be in a position to cure this loss once the station has been divested—there would be no way to "undo" the forced sale. Nor would there be any reasonable guarantee that Emmis could buy a similar station in the market at a later date.[59] Each station is highly unique, with differing technical characteristics including distinctive signal contours—as well as differing audiences that are carefully cultivated over many years—representing significant goodwill.[60]

Such divestiture also would preclude Emmis from using this station to communicate a unique set of messages, selected through its editorial control of the station, to audiences in the

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56 A stay is a form of interim relief. Whether a stay is warranted is evaluated under the same general standard as a request for preliminary injunctive relief. *Amendment of Part 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broad. Indust.*, 4 FCC Rcd 6476, 6476-77 (1989) (Order Denying Stay Request). These standards are set forth in *The Interstate, Interexchange Marketplace*, 12 FCC Rcd 15739, 15748 & n.56 (1997) (Order) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), *as modified*, *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

57 *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

58 *Declaration of Jeffrey H. Smulyan*, ¶ 6 (May 3, 2002) (Attachment A) (*"Smulyan Decl."*); *March 28 Letter*; *Sept. Ruling*.

59 *Smulyan Decl.*, ¶ 5.

60 *Id.*

Honolulu DMA.[61] As such, it would exclude Emmis from a significant portion of its business—owning and operating the divested television station. Even if Emmis still operated the remaining station, such a loss is routinely treated as "irreparable harm" by the courts.[62]

In *Holiday Tours*, for example, the court preserved the *status quo* by staying an agency order that would have similarly terminated a portion of a tour operator's business.[63] Holiday Tours was prohibited from providing bus tours while still allowed to provide a limousine service. The court found that "[t]he harm to Holiday Tours in the absence of a stay would be its destruction in its current form as a provider of bus tours."[64] Like Holiday Tours, Emmis would lose a major portion of its business in Hawaii and such harm would be irreparable because "[t]he destruction of a business is . . . not . . . [a] 'mere' economic injur[y] . . . for which 'adequate compensatory or other corrective relief will be available at a later date.'"[65]

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61 The divestiture would thus "interfere[] with [Emmis'] speech rights by restricting the number of viewers to whom [it] can speak." *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129 (D.C. Cir. 2001), *cert denied*, *Consumer Federation of America v. FCC*, 122 S. Ct. 644 (Dec. 3, 2001). Accordingly, failure to grant the requested relief would violate Emmis' First Amendment rights. As the Supreme Court has clearly stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citing *New York Times Co. v. United States,* 403 U.S. 713 (1971)); *Bery v. New York*, 97 F.3d 689, 693-94 (2d Cir. 1996) (noting that when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary).

62 Emmis notes that the D.C. Circuit granted Sinclair interim relief, based on a similar showing of irreparable harm, to maintain the *status quo* by staying a Commission-ordered divestiture of television duopolies during the pendency of its appeal of the rule. *Sinclair Broadcast Group, Inc. v. FCC*, No. 01-1079 (filed June 20, 2001).

63 *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Holmes v. United States*, 815 F. Supp. 429, 431 (M.D. Ala. 1993) (finding "that the plaintiff [grocer] will suffer irreparable harm" if agency order removing grocery from food stamp program was not stayed, "[s]ince it is undisputed that plaintiff derives 75% of his income from food stamps and that he will probably lose his business if he is disqualified from the program. . . ."), *stay dissolved on other grounds*, 868 F. Supp. 1348 (M.D. Ala. 1994), *aff'd*, 67 F.3d 314 (11th Cir. 1995).

64 *Holiday Tours*, 559 F.2d at 843.

65 *Id.* at 843 n.2 (quoting *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925). The D.C. Circuit has held that even "[r]ecoverable monetary loss may constitute irreparable harm" if "[the] loss threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Indeed, because there is no adequate form of restitution available, it is unrealistic to view "the serious, irreparable damage caused by the summary shutdown of an ongoing business enterprise" in any other light. *United States v. All Assets of Statewise*

The FCC has followed these generally accepted principles as well. For example, in *CBS Communications Services, Inc. and Centennial Wireless PCS License Corporation,*[66] the Commission found irreparable injury where "immediate compliance with the [order] could cause substantial disruption to Centennial's operation" in one of its markets.[67] In that case, the movant faced the shutdown of a portion, but not all, of its wireless telephony network. The FCC made clear that a party is not "required to show that its entire network would be adversely affected in order to show irreparable injury."[68]

Divestiture in the instant case would *with certainty* remove Emmis from operating a television station with a valuable network affiliation. The mere fact that Emmis has an additional station in the market does not change the fact that the loss will be irreparable. Thus, although Emmis would remain in the business of television broadcasting in Hawaii, it would be ousted from the business of owning the divested station and reaching that station's unique audience with unique programming.

The "irreparable" nature of the loss of a business through divestiture is especially compelling where, as is the case here, the business and related assets are not easily replaceable. As explained in the attached Declaration of Jeffrey H. Smulyan, Chairman and Chief Executive Officer of Emmis, network-affiliated VHF television stations like KHON-TV and KGMB(TV)

(Continued . . .)
Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992); *see also Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co. of New York, Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984) (loss of a "distributorship, an ongoing business" constitutes irreparable harm).

66 13 FCC Rcd 4471 (1998) (Memorandum Opinion and Order).

67 *Id.* at 4479.

68 *Id.*

do not frequently become available for acquisition.[69] As a result, if a station were lost through divestiture or otherwise, there would be little likelihood that the original owner would later have an opportunity to re-purchase that station, or be able to acquire a comparable one in the same market.[70] Forcing Emmis to move forward with the scheduled divestiture also would deprive it of the efficiencies and other benefits of owning and operating two stations in Hawaii. Further, as noted above, each individual station has "unique" and distinctive attributes.[71]

In any event, Emmis' losses would not be compensable in money damages. First, Emmis would have no right to make a claim against the FCC for money damages it suffers as a result of an action of the agency that is later found to be invalid. Second, any losses would be impossible to measure, representing lost profit and other potential benefits. Thus, the harm to Emmis, absent a grant of the requested interim relief, unquestionably meets the legal definition of irreparable injury.

B. <u>Emmis Is Likely to Prevail on the Merits</u>

1. The *Sinclair* Decision Obligates the Commission to Reexamine the Entire Duopoly Rule, and the Judgment of the Court of Appeals Makes Modification or Repeal of the Portion of the Rule Applicable to Emmis Highly Likely

The D.C. Circuit's decision in the *Sinclair* case, combined with the Commission's biennial review obligations, will require the agency to reexamine the duopoly rule before the end of 2002. As explained above, the court in *Sinclair* affirmatively directed the FCC to review its

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69 *Smulyan Decl.*, ¶ 5.

70 *Id.*

71 *See, e.g., Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) (recognizing "irreparable harm in the loss of a relatively unique product"); *Starlight Sugar, Inc. v. Soto*, 114 F.3d 330, 332 (1st Cir. 1997) ("the loss of a unique or fleeting business opportunity can constitute irreparable injury"). *Cf. United Church of the Med. Ctr. v. Medical Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury.").

restriction on duopolies. Although the *Sinclair* court limited its arbitrary and capricious finding to the definition of "voices" under the rule, the court remanded the entire rule to the FCC for reconsideration[72] and suggested that the "choice of eight" in the voice-count component of the rule might be subject to independent challenge as arbitrary and capricious.[73] The number four in the "no two in the top four" portion of the duopoly rule was no more or less "plucked out of thin air" than the number eight in the voices calculus.

Similarly, the requirement that the Commission consider the inclusion of non-television voices, including newspaper and cable, could directly affect the number of voices relevant to any diversity analysis in the Honolulu market. The court's reasoning in this regard—that the FCC's consideration of non-broadcast voices in the cross-ownership rules rendered their exclusion from the local ownership rules arbitrary and capricious—applies with equal force to the "no two in the top four" provision of the duopoly rule.[74] The court's broad remand language requires the Commission to initiate a proceeding to consider the entire duopoly rule, including repeal or modification of the current top-four voices standard.

Additionally, any examination of the proper "voices" definition under the duopoly rule inevitably will lead to reconsideration of other aspects of the restriction, including the top-four component, as well as the need for the rule in general. As the court noted with respect to Sinclair's challenge to the Commission's choice of the number eight in the voice-count test,

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72 *Sinclair*, 284 F.3d at 169 ("[W]e remand the rule to the Commission for further consideration").

73 *Id.* at 162 ("[E]ven were we to reject Sinclair's assertion that the number eight was 'plucked out of thin air,' in view of the rulemaking record, our resolution of Sinclair's challenge to the Commission's definition of 'voices' requires that the rule be remanded to the Commission. On remand the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit.").

74 *Id.* (noting that the exclusion of non-broadcast voices from the duopoly rule ran counter to the evidence before the Commission and was not supported by any reasonable explanation) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"[t]here is an obvious interrelatedness between the Commission's choice of eight and its definition of 'voices.'"[75] The same is true with respect to the top-four standard. If—as is the case under the one-to-a-market rule—daily newspapers, cable systems, and radio stations are to be viewed as relevant "voices" under the duopoly rule, the Commission's diversity-based and competition-based rationales for restricting common ownership of two top-four television stations within the same market inescapably will be called into question. More generally, any proceeding aimed at fully reexamining one key component of the duopoly rule naturally should take into account underlying questions regarding the need for the rule in the first place.

Moreover, the Commission is obligated to give full effect to the decision in *Sinclair*, which "establishes the law binding further action" by the agency.[76] The judgment encompasses "everything decided either expressly or by necessary implication" by the court of appeals.[77] Moreover, agency actions on remand must be consistent with both the letter and spirit of the court's mandate, construed in light of its opinion.[78] The D.C. Circuit reviews an agency's "response to a judicial decision for contrariness 'to either the letter or the spirit of the mandate' in the original case."[79] There is no doubt that in order to give full effect to the court's reasoning and judgment in *Sinclair*, the Commission is, *at a minimum*, obligated to reconsider its rationale

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75 *Id.* at 162.

76 *Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (footnote omitted); *see also* 47 U.S.C. § 402(h) (2000) (providing that "it shall be the duty of the Commission . . . to forthwith give effect" to any judgment reversing an FCC order).

77 *Cleveland*, 561 F.2d at 348 (*quoting Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939)).

78 *Ivan F. Boesky Sec. Litigation v. Maxus Energy Corp.*, 957 F.2d 65, 69 (2d Cir. 1992) (noting that "actions on remand should not be inconsistent with either the express terms or the spirit of the mandate") (internal quotation marks omitted); *see also Yablonski v. United Mine Workers of America*, 454 F.2d 1036, 1038 (D.C. Cir. 1972) (noting that a lower court "is without power to do anything which is contrary to either the letter or the spirit of the mandate construed in light of the opinion of [the] court deciding the case") (internal quotations omitted).

79 *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990).

for selection of the number four and reconsider its exclusion of cable, newspaper, and radio voices from that number. The spirit of the court's decision and its recognition of the interrelatedness of the definition of "voices" with the overall issue of the need for specific numerical limitations requires reexamination of the administrative foundations of the entire rule.

2. As a Matter of Law, Until the FCC Completes the 2002 Biennial Review, It Must Be Presumed that the Duopoly Rule Will Be Repealed or Substantially Modified

In addition, pursuant to Section 202(h) of the 1996 Act, the Commission is obligated to begin a formal review of all of its broadcast ownership rules by the end of 2002.[80] Notably, the FCC has not reevaluated the duopoly rule in either of its prior biennial review proceedings. The agency declined to consider the rule in its 1998 proceeding, relying instead on its separate Local Television Ownership rulemaking as fulfillment of its biennial review obligation.[81] Likewise, in the 2000 proceeding, the Commission opted not to do a thorough review of the rule because the *Local Television Ownership Order* recently had been issued.[82] Thus, a thorough review of the duopoly rule in the context of the Commission's mandatory biennial proceeding is long overdue.

The D.C. Circuit held in *Fox* that Section 202(h) of the 1996 Act "carries with it a presumption in favor of repealing or modifying the ownership rules."[83] The court repeated this finding in *Sinclair*, stating that the biennial review mandate was "designed to continue the

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[80] *1996 Act* § 202(h).

[81] *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11060 (2000) (Biennial Review Report) ("*1998 Biennial Review Order*").

[82] *See, e.g.*, Federal Communications Commission Biennial Regulatory Review 2002, Staff Report 38 (September 19, 2000) ("Because the local television multiple ownership rule was so recently relaxed, the staff believes that no further changes are warranted at this time. Instead, staff will monitor the effects of deregulatory actions on the marketplace to determine whether further changes are warranted.").

[83] *Fox*, 280 F.3d at 1048.

process of deregulation."[84] In concrete terms, the FCC must "start with the proposition that the rules are no longer necessary" and must "justify [the] continued validity" of any rule it declines to repeal or relax.[85] The court has expressly found that the Commission "applied too low a standard" in reviewing ownership rules in its 1998 biennial review proceeding.[86] In addition, the *Fox* court found that "a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."[87] As the FCC itself has recognized, pending completion of the 2002 biennial review, it must be presumed that the Commission will not be able meet this burden and, therefore, that the agency will not be able to justify retention of the duopoly rule.[88]

3. Prior FCC Reasoning Is Insufficient to Retain the Duopoly Rule

Even in the absence of a more stringent substantive standard for reevaluation pursuant to the biennial review, there are compelling reasons to believe that the top-four prong of the duopoly rule should be repealed or substantially modified.[89] In the *1999 Local Television Ownership Order*, the FCC stated that the "ultimate objectives" of the duopoly rule in general and, specifically, the top-four station rule, were "to promote diversity and to foster economic competition, while minimizing any adverse effects [its] pursuit of these goals has on the efficient

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84 *Sinclair*, 284 F.3d at 149.

85 *1998 Biennial Review Order*, 15 FCC Rcd at 11151 (Separate Statement of Commissioner Michael K. Powell); *see id.* at 11132 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

86 *Fox*, 280 F.3d at 1050.

87 *Id.*

88 *See supra* Section II.C.

89 We note that although the Commission challenges the more stringent substantive standard adopted by the D.C. Circuit in its rehearing petition in *Fox*, it does not ask the panel or the *en banc* court to reexamine the *Fox* court's conclusion that "Section 202 carries with it a presumption in favor of repealing or modifying the ownership rules." *FCC Rehearing Petition*, at 9 & n.1. Thus, even pursuant to a public interest reevaluation, the presumption would be that the rule *does not* serve the public interest.

organization of the industry."[90] The rule was an effort to "strike a balance between the benefits to the industry and to the public of common ownership, such as economies of scale which can result in stronger stations and improved service to the public, and the reduction in the diversity [] and competition in a market that may arise from consolidation of station ownership."[91] Thus, as with all of its local ownership rules, the Commission relied on a desire to promote its "twin goals" of diversity and competition in adopting the top-four station rule. At the same time, the FCC recognized that it must be mindful of the ability of broadcasters to operate efficiently and thereby deliver superior public service to viewers and that it has an obligation to ensure that its attempt to maximize diversity and competition does not run afoul of this goal.

The D.C Circuit's *Sinclair* decision, which, as discussed above, struck down the definition of "voices" under the local television ownership rule, casts substantial doubt on the validity of the analysis of diversity and competition in the *1999 Local Television Ownership Order*. In conducting its court-ordered reexamination of the rule, the Commission will not be able to show that there is any legitimate diversity-based rationale for the top-four component of the rule. The diversity-based arguments advanced in the Commission's 1999 Order were unsubstantiated, and in light of *Sinclair*, the agency can no longer make a plausible argument for excluding non-television voices from its diversity calculus. Similarly, while the agency also implemented the top-four component of the duopoly rule to "ensure that the largest stations in the market do not combine and create potential competition concerns,"[92] the FCC failed to adequately consider the pro-competitive pressures placed on television broadcasters in general

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90 14 FCC Rcd at 12910.

91 *Id.* at 12911.

92 *Id.* at 12933.

from other media segments such as radio, cable, DBS, and newspapers.[93] Nor did the Commission consider that denying the economic benefits of consolidation to broadcast entities—when facing competition from increasingly large cable MSOs, DBS, and other media outlets—might result in the loss of numerous broadcast voices in the long term. Applying the court's reasoning regarding the inadequacy of the definition of local "voices" thus would also force the Commission to repeal the top-four station component of the rule.

Moreover, applying an audience reach test only to issues of local ownership concentration and not to cross-ownership situations creates a fatal legal flaw demanding the repeal of the top-four component. Critical to the *Sinclair* court remand of the duopoly rule was the fact that the Commission analyzed ownership issues "differently in the cross-ownership and local ownership rules."[94] This inconsistency also was identified in *Fox* in the court's vacatur of the cable/broadcast cross-ownership rule.[95]

In promulgating the duopoly rule in the *1999 Local Television Ownership Order,* the Commission has once again created an improper, disparate regulatory regime by creating an audience-based test for ownership of two television stations, while relying solely on voice counts to limit television/radio cross-ownership combinations. The Commission provides no reason why the voice test created for the purposes of the duopoly rule is not similarly sufficient to address both diversity and competition concerns. Accordingly, the Commission cannot show, in either the *Sinclair* remand or the 2002 biennial review proceeding, that the duopoly rule and its

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93 *Id.* at 12935.

94 *Sinclair*, 284 F.3d at 164.

95 *Fox*, 280 F.3d at 1052.

top-four station component are "necessary in the public interest" or even in the public interest simpliciter.

a. The Duopoly Rule Is Not Necessary to Promote Diversity

The Commission has, thus far, been unable to justify retention of the duopoly rule in its current form as necessary to protect diversity, and is unlikely to be able to do so in the future. With respect to the top-four component of the rule, the only diversity-based rationale that the Commission offered in its *1999 Local Television Ownership Order*—that the top-four stations are the most likely sources of local news—is unsubstantiated and seemingly contradicted by later evidence. Moreover, the D.C. Circuit found in its recent decision in *Sinclair* that the FCC had failed to adequately explain why non-television voices should be excluded from the voice-count test under the duopoly rule.[96] The same holds true for the top-four station standard—the FCC has not established that its decision to exclude other sources of local news and information from the calculus is reasonable or necessary to promote diversity. When alternative media sources are appropriately taken into account, there is no plausible diversity rationale that could support retention of the rule in its current form.

Beyond simply asserting that "the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming,"[97] the FCC did not offer any explanation in its *1999 Local Television Ownership Order* of how its implementation of the top-four component of the duopoly rule would further its interest in diversity. This conclusory statement, however, was not supported by any independent evidence in the record. Perhaps even more significant is the fact that the Commission's

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96 *Sinclair*, 284 F.3d at 161-66.

97 *Local Television Ownership Order*, 14 FCC Rcd at 12933.

speculation regarding local news operations of stations outside of the top four is seemingly contradicted by its own more recent statement in the newspaper/broadcast cross-ownership context that "approximately 77% of commercial TV stations provide local news" and that one third of the commercial television stations that are not affiliated with the original "Big Three" networks offer local news.[98]

In addition, the *Sinclair* decision conclusively establishes that the Commission cannot ignore the existence of alternative sources of news, information, and entertainment when evaluating the level of diversity in the local media marketplace. Critically, the *Sinclair* court held that the agency had not adequately explained why it had excluded other media outlets from its diversity analysis with respect to the rule's voice-count test.[99] Indeed, the court found that the only study upon which the Commission relied in that proceeding to substantiate its claim that television remains the primary source of news and information for most Americans "did not differentiate between broadcast and cable television as sources of local news," and thus failed to "fill the evidentiary gap."[100]

Likewise, the D.C. Circuit recognized in *Sinclair* that the Commission's reliance on "unresolved questions about the extent to which [non-broadcast] alternatives are widely accessible and provide meaningful substitutes to broadcast stations" for purposes of diversity is entirely inconsistent with the edict of the 1996 Act, which requires the FCC to "'repeal or modify' any rule that is not 'necessary in the public interest.'"[101] Indeed, the D.C. Circuit has

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98 *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd 17283, 17290 (2001) (Order and Notice of Proposed Rulemaking) ("*Newspaper/Broadcast Cross-Ownership NPRM*").

99 *Sinclair*, 284 F.3d at 168-69.

100 *Id.* at 163.

101 *Id.* at 164 (quoting *Fox*, 280 F.3d at 1042).

"squarely considered and rejected the kind of cautionary approach employed by the FCC in adopting the Local Ownership Rule," likening the 1996 Act's mandate to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')," rather than the Commission's "wait-and-see attitude."[102] This analysis applies with equal force to other aspects of the rule, including the top-four station component. Consequently, the FCC is, as a matter of law, precluded from relying on the asserted absence, to date, of empirical evidence establishing that other media are substitutes for television stations as a basis for retaining the duopoly rule. In fact, under *Fox*, it is the *Commission's burden* to produce evidence that cable and newspapers *are not* alternative sources of news and information for diversity purposes.

This is a burden that the Commission simply cannot carry. The explosion in media outlets formed the basis of Congress' decision to demand that the Commission re-examine its broadcast ownership rules in the first place. The debates on the local television ownership rule confirm, in particular, that Congress intended that the Commission undertake substantial revisions based on the increase in media outlets. Senator Inouye pointed out that: "Today's [] marketplace is characterized by an abundance of media outlets that were not present or contemplated when the [duopoly] rule was last revised, and the FCC should take this development into consideration. This new competition . . . threatens the very viability of free, over-the-air programming."[103]

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102 *Id.* at 171 (Sentelle, J., concurring in part and dissenting in part) (citing *Fox*, 280 F.3d at 1042, 1044).

103 142 Cong. Rec. S706 (daily ed. Feb. 1, 1996) (statement of Sen. Inouye); *see also id.* at S705 (statement of Sen. Ford); ([I]n the last 32 years, the local media have gained so many new competitors that I have begun to question whether the duopoly rule still promotes good policy. . . I believe that we may have reached the point where the viability of free over-the-air programming, provided by single-channel broadcasters, may be threatened by the new multi-channel competitors."); *id.* at H1164 (statement of Rep. Stearns). ("Since the [duopoly] rule was last revised, the local media marketplace has undergone a breathtaking transformation. This has been characterized not only by a large increase in the number of broadcast stations . . . but more significantly by an onslaught of new, multichannel rivals to traditional broadcasters. . . It is agreed that, when it considers revision of the duopoly rule pursuant to this conference report, the FCC should give serious weight to the impact of these changes in the local

In the *Local Television Ownership Order* itself, the Commission acknowledged that the number of traditional and alternative media outlets had increased substantially, and that the growth in the number of such outlets "increase[s] the range of choices open to . . . viewers and listeners."[104] The Commission has repeatedly reached an identical conclusion in its subsequent ownership proceedings, including those recently initiated to consider changes to its newspaper/broadcast cross-ownership rule and its local radio ownership rules.[105] The weight of available evidence establishes that numerous other content providers do indeed supply local viewers with news and information, rendering the local television ownership rule unnecessary to protect diversity.[106] As of June 2001, there were 1,678 full power television stations in the U.S.,[107] and the transition to digital television will permit broadcasters to transmit high definition television, multiple streams of standard definition television, or a combination of ancillary services in addition to broadcast signals, vastly increasing the variety of programming available

(Continued . . .)
television marketplace—changes which have left broadcasters as single-channel outlets in a multi-channel marketplace.").

104 *Local Television Ownership Order*, 14 FCC Rcd at 12917.

105 *Rules and Policies Concerning Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 16 FCC Rcd 19861, 19875-76 (2001) (Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking) ("*Local Radio Ownership NPRM*"); *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17283-84, 17288-89.

106 *See, e.g.*, Comments of Media General, *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket Nos. 01-235, 96-197, at 19-29, App. 9-14 (filed Dec. 3, 2001) (listing media outlets in various markets, ranging from the 14th largest to the 159th largest DMA); Comments of Hearst Corporation, *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket Nos. 01-235, 96-197, at 10-16, App. A-C (filed Dec. 3, 2001) (demonstrating abundance of media outlets available to consumers).

107 *Broadcast Station Totals as of June 30, 2001* at <www.fcc.gov>. Even nine years ago, when the FCC released a study of the video marketplace, 95 percent of all television households were located in markets with five television stations or more, and the majority of television households were in markets with ten television stations or more. *See* Comments of the Newspaper Association of America, *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, at 45 (filed July 21, 1998) ("*NAA 1998 Biennial Review Comments*").

over-the-air.[108] In addition, the FCC has licensed 2,396 low power television stations and 232 Class A TV stations, which by definition must provide local programming.[109] The number of broadcast radio stations, which provide listeners with entertainment, news, and information, also has continued to grow, reaching 12,932 in 2001,[110] while the number of recognized radio program formats has expanded from 15 to more than 90.[111]

Alternatives to traditional media have multiplied as new media outlets have continued to enter the marketplace, and consumers now enjoy the widest choice of outlets that has ever been available. More than 200 video programming sources are available on cable systems, 99 percent of all cable subscribers receive at least 30 channels, 68 percent enjoy 54 or more, and 6 percent subscribe to systems with 91 channels or more.[112] Almost 84 percent of all U.S. television households now receive service from a multi-channel video provider.[113]

Local and regional cable networks also are instrumental in broadening the alternatives for local news. While the national services such as CNN and MSNBC are most familiar, other cable news networks such as Newschannel 8 in the District of Columbia and Texas Cable News, cover a limited geographical area, such as a city or metropolitan area, providing citizens with around-

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108 *See generally Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997) (Sixth Report and Order); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 (1997) (Fifth Report and Order).

109 *Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd at 17288.

110 *See id.*; *Broadcast Station Totals as of June 30, 2001* at <www.fcc.gov>.

111 *See* BIA Research, Inc., *Radio Market Report 2000* Table 2 (3d ed. 2000); *Broadcasting & Cable Yearbook 2001* at D-656-57.

112 *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17288.

113 *Id.*

the-clock coverage of local news and events.[114] These stations provide alternatives to local television stations in the provision of local news and information, and cannot rationally be ignored for purposes of measuring diversity.[115] The number of regional news and sports channels available on cable has shown steady growth over the last several years.[116]

Accordingly, Emmis respectfully submits that the Commission has failed to provide any legitimate diversity-based rationale for retention of the duopoly rule in its current form. The *Sinclair* decision's rejection of the Commission's decision to exclude non-television voices in its diversity analysis, coupled with the tremendous level of diversity in today's media marketplace, compels a conclusion that the duopoly rule is likely to be repealed on remand and/or during the 2002 biennial review proceeding. At the absolute minimum, the rule is almost sure to be substantially modified, at least in some markets.

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114 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1315 (2002) (Eighth Annual Report) ("*Eighth Annual MVPD Competition Report*"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd 6005, 6083-84 (2001) (Seventh Annual Report).

115 The Commission's recognition, on numerous previous occasions, that common ownership of multiple media outlets in a market provides a commercial incentive to program the stations differently renders maintenance of the top four station component of the duopoly rule based on diversity concerns all the more unwarranted. The idea that competing parties in a local market have a commercial incentive to provide "greatest common denominator" programming, while a single party that owns multiple outlets has a commercial incentive to provide more diverse programming to appeal to all substantial interests has been recognized by the Commission, *see, e.g., Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17292; *Local Radio Ownership NPRM,* 16 FCC Rcd at 19877, and is supported by empirical evidence which has been previously relied upon by the FCC. *See, e.g.*, Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge, Mass.: Harvard Univ. Press 1992), Chapters 3 and 4 (cited in *Amendment of Section 73.658(g) of the Commission's Rules—The Dual Network Rule*, 15 FCC Rcd 1253, 11263 n.30 (2000)); Steiner, P.O., *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, Q. J. Econ. 66 (1952) (cited in *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 10 FCC Rcd 3524, 3551 n.81 (1995) (Further Notice of Proposed Rulemaking)*; see also Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2771-72 (1992) (Report and Order); *Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3276 (1991) (Notice of Proposed Rulemaking).

116 *Eighth Annual MVPD Competition Report*, 17 FCC Rcd at 1314-15.

b. <u>The Local Television Ownership Rule Is Not Necessary to Promote Competition</u>

The omission of non-television voices from the Commission's analysis of competition with respect to the duopoly rule also inappropriately ignores many other competitors in the local advertising market. In *Sinclair*, the D.C. Circuit concluded that the FCC had not sufficiently supported its decision to exclude non-television media from the relevant market when analyzing the effects of television ownership on competition for advertising dollars.[117] As it had with regard to the Commission's diversity analysis, the court faulted the FCC's attempt to rely on uncertainty with regard to the substitutability of various media for advertising purposes.[118] Criticizing the Commission for recognizing that the degree of substitutability is a "critical issue" on which there were still "unresolved questions," while at the same time deciding to retain its television-only market definition, the *Sinclair* court found that the Commission had inadequately explained its decision to exclude media other than television stations from the competition analysis underlying the local television ownership rule.[119]

Since the issuance of the *Local Television Ownership Order*, the FCC has, in other ownership proceedings, requested and received further comment and empirical analysis regarding the degree of substitutability among various media for advertisers.[120] Indeed, there is ample evidence already before the Commission to suggest that many alternative outlets compete vigorously with television stations for advertising revenue.[121]

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117 *Sinclair*, 284 F.3d at 163-64.

118 *Id.*

119 *Id.*

120 *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17290.

121 Several economic studies supporting this view have previously been submitted to the Commission in other proceedings. *See, e.g.*, Kent Mikkelsen, Economists Incorporated, *Horizontal and Vertical Structural Issues and the*

Cable television, in particular, has become an even stronger force in the local advertising market and is an effective constraint on television advertising prices. An examination of historical and projected advertising expenditures on local and regional cable versus television stations between 1995 and 2005 reveals that cable competes vigorously with broadcast television stations for local advertising revenue and protects against any possible exercise of market power. Between 1995 and 2000, television advertising grew at a compound annual rate of 6.4 percent.[122] Local cable advertising, in comparison, increased at an annual compound rate of 16.9 percent, substantially exceeding television stations.[123] Similarly, regional sports advertising on cable rose at an annual compound rate of 13.5 percent.[124] Projections over the next five years call for local television advertising to grow by only approximately 3.1 percent annually,[125] while local cable advertising is expected to substantially outperform television, rising by 9.8 percent.[126]

(Continued . . .)
Newspaper-Broadcast Cross-Ownership Ban, 3, 9-10 (Dec. 2001) (attached to Newspaper Association of America Comments in MM Docket Nos. 01-235, 96-197); National Economic Research Associates ("NERA"), *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule,* 2 (May 17, 1995) (attached to Local Station Ownership Coalition Comments in MM Docket No. 91-221 (filed May 17, 1995)) (concluding that a market for local advertising that includes radio, broadcast and newspaper advertising also includes direct mail, magazines, yellow pages, and outdoor billboards); Economists Incorporated, *An Economic Analysis of the Broadcast Television National Ownership, Local Ownership, and Radio Cross-Ownership Rules*, 23-24 (May 17, 1995) (attached to CBS, NBC, ABC and Westinghouse Joint Comments in MM Docket No. 91-221 (filed May 17, 1995)) (citing empirical evidence demonstrating that other forms of advertising, such as yellow pages, outdoor and direct mail, are substitutes for video, radio and newspaper advertising, and concluding that "there is no evidence to support a conclusion that [these] other forms of advertising . . . do not constrain the prices of video, radio and newspaper advertising").

122 Veronis Suhler, *Communications Industry Forecast* 140-41 (5th ed. July 2001) ("*Communications Industry Forecast*").

123 *Id.* at 160.

124 *Id.*

125 *Id.* at 140-41.

126 *Id.* at 160.

Projections call for regional sports advertising to increase by an even larger amount—11.5 percent.[127]

As discussed above, the contemporary video marketplace is extremely diverse and highly competitive. Moreover, that market is expanding at an astounding rate as alternative newspapers, cable networks, DBS, and now the Internet have emerged to challenge traditional media such as television stations. Due to the abundance of cable, daily and weekly newspapers, and other advertising outlets in today's advertising marketplace and the degree to which they compete with television stations, protecting competition in local advertising markets is a far less critical concern. Moreover, this rise in the number and power of advertising alternatives is augmented by the entry of additional radio and television stations and other media outlets into local markets. The presence of additional outlets is sufficient to protect against any prospect of "market dominance" by a television duopoly, regardless of station rank, and therefore eliminates the need for the local television ownership rule in its current form.

c. Maintenance of the Duopoly Rule Would Be Contrary to, and Cannot Be Reconciled with, Legal Precedent and Commission Decisions Regarding Other Local Ownership Rules

In addition, any decision to maintain the local television ownership rule would be entirely inconsistent with prior FCC ownership orders and recent decisions of the D.C. Circuit. Indeed, it is now clearer than ever that the Commission bears a high burden to present adequate explanation for its departure from prior decisions.[128] As the D.C. Circuit's decisions in *Fox* and *Sinclair* make abundantly clear, the FCC is constrained from reaching inconsistent results in analogous situations, must adequately explain any decision to depart from prior conclusions, and

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127 *Id.*

128 *Fox*, 280 F.3d at 1047.

is manifestly not "free to ignore" its own orders.[129] Certainly, the agency also must abide by court precedent.

In light of the strict mandate established in these decisions, the Commission will not be able to reconcile its prior decision to relax the one-to-a-market rule with maintenance of the top-four standard of the duopoly rule. As noted above, pursuant to the current one-to-a-market rule—which was adopted in the very same Order in which the Commission modified the duopoly rule—a single entity may own a television station and up to seven radio stations in large markets without regard to the market rank or audience share of the radio outlets.[130] Nowhere in the *1999 Local Television Ownership Order* does the Commission explain its decision to incorporate a market rank component into the duopoly rule, but to have no such element with respect to the analogous one-to-a-market rule. Rather, the Commission simply noted in revising the television/radio cross-ownership rule that "the voice test component of the revised rule ensures that the local market remains sufficiently diverse and competitive."[131] Because the Commission's unexplained decision to analyze the same issues "differently in the cross-ownership and local ownership rules" was critical to the court's decision in *Sinclair*,[132] this inconsistency between the rules cannot stand upon reexamination. Accordingly, there is a very high likelihood that the top-four component of the duopoly rule either will be repealed or significantly modified when the FCC reconsiders the rule.

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129 *Id.* at 1052; *see also id.* at 1044 (finding arbitrary and capricious FCC's failure to address its conclusion in the 1984 Report that the national television ownership cap was no longer necessary when deciding that the rule should be retained in the 1998 biennial review); *Sinclair*, 284 F.3d at 164 (finding that the deficiency of the Commission's explanation for its decision to exclude non-television voices for purposes of the local television ownership rule was "underscored" by its different conclusion elsewhere).

130 *See supra* Section IIA.

131 *Local Television Ownership Order*, 14 FCC Rcd at 12948.

132 *Sinclair*, 284 F.3d at 164.

Moreover, the *Sinclair* court struck down the definition of "voices" under the duopoly rule because of its patent inconsistency with the voices accounted for under the one-to-a-market rule. As noted above, the one-to-a-market rule counts not only television, but also certain radio outlets, daily newspapers, and cable systems as relevant "voices."[133] Reconciling this inconsistency between the duopoly and radio/television cross-ownership rules very likely will lead to either repeal or modification of the top-four station standard. If radio outlets, newspapers, and cable are added to the voice calculus under duopoly rule—a probable scenario in light of the *Sinclair* remand—the Commission will be faced with the tough question of how to adjust the audience-rank component of the rule to fit within this new model.[134]

In addition, maintaining the current version of the duopoly rule would be flatly inconsistent with the *Fox* court's decision to vacate the Commission's cable-television cross-ownership rule. That holding effectively authorized common ownership of at least one television station (and potentially two outside of the top-four stations in a market) and the incumbent cable provider, which may control the delivery of hundreds of television channels. In *Fox*, the D.C. Circuit flatly rejected the Commission's decision to retain the cable-television cross-ownership rule, finding insufficient the FCC's arguments that the rule was necessary to protect either

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133 *See supra* Section IIA.

134 There are two daily newspapers that serve Honolulu specifically, and an additional four dailies that serve various other islands, for a total of six daily newspapers serving Hawaii. *See* www.newslink.com; www.floridalink.com/links/hawaii.htm; www.usnpl.com. In addition, there are more than 75 radio stations that serve Hawaii. *Broadcasting & Cable Yearbook 2001*, at D-123-26. The area is served by an additional seven weekly newspapers, three alternative newsweeklies, one business-news weekly, and two campus dailies. *See* www.newslink.com; www.floridalink.com/links/hawaii.htm; www.usnpl.com. Moreover, cable penetration in Hawaii is 88% — the second highest level in the nation. *Broadcasting & Cable Yearbook 2001*, at C-2-5. Any attempt to modify the top-four station rule to take into account these additional sources would require resolution of the difficult question of how to compare the various media for purposes of determining market rank, rendering it even more likely that the duopoly rule will not be retained in its current form.

diversity or competition.[135] As the *Fox* court recognized, absent the cable-television cross-ownership rule, a cable operator would be permitted to acquire television stations in markets where it owns cable systems, and, indeed, where it is both the incumbent cable operator as well as the owner of a regional cable news or sports channel.[136] Yet, the court found unpersuasive and unsupported the FCC's argument that the rule was "necessary to further [the] goal of diversity at the local level."[137]

Rejecting the argument that the rule was necessary because "[c]able/TV combinations . . . would represent the consolidation of the only participants in the video market for local news and public affairs programming, and would therefore compromise diversity," the court highlighted the FCC's burden to explain inconsistencies in its decisions across various media.[138] The court also rejected the Commission's conclusion that the rule was required to ensure competition, and even went so far as to determine that the rule should be vacated because it was "a hopeless cause."[139] It simply makes no sense to continue to prohibit common ownership of more than one television station among the top four in a market in light of this rule change. The *Fox* decision's conclusion that the cable-television cross-ownership rule could not be justified in today's media marketplace renders maintenance of the top-four station component highly suspect, and suggests that it is exceedingly likely that the duopoly rule will be repealed or substantially modified in future FCC proceedings.

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135 *Fox*, 280 F.3d at 1047-48.

136 *Id.* at 1037 (discussing Time Warner's argument that, absent the rule, it could reap efficiencies from the common ownership of its New York cable system, its local news channel, and a television station).

137 *Id.* at 1048.

138 *Id.* at 1051-52.

139 *Id.* at 1053.

C. <u>No Interested Party Would Suffer Harm if the Interim Relief Were Granted</u>

An order maintaining the *status quo* pending final resolution should be granted where there is "little indication that [such action] will result in substantial harm to either [the] Commission or to other [interested parties]."[140] Here, there is no substantiated evidence that the extension of time requested by Emmis would result in any harm to the FCC, television viewers, or competitors.

The sole party who opposed Emmis' waiver request did not present a substantial showing of harm as a result of maintenance of the *status quo*, and the hypothetical concerns raised by the commenter are insufficient to deny the requested relief.[141] "The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact."[142] In opposing such relief, parties cannot rely on mere conjecture about harms that *might* occur.[143] There is no evidence that the supposed harm identified by Mr. Laidlaw has occurred in the last eighteen months, and no such showing can be made.

In staying an agency order that would have ousted a bus and limousine tour company from its bus tour line of business, the D.C. Circuit in *Holiday Tours, Inc.* held that, "in the absence of substantiation of severe economic impact," continued competition with the petitioner in accordance with the *status quo* could not inflict a cognizable harm on other bus tour

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140 *Holiday Tours*, 559 F.2d at 843.

141 Letter from Donald F. Laidlaw, to Roy J. Stewart, Chief, Mass Media Bureau (March 1, 2002). Mr. Laidlaw's sole claim of harm is that Emmis ownership of KGMB(TV) and KHON-TV forces competitors in the market to "suffer a significant competitive disadvantage." *Id.* at 6. Not only is this assertion not supported by the record, but Mr. Laidlaw does not explain in any detail how such a competitive disadvantage will present itself.

142 *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1067 n.6 (D.C. Cir. 1998) (quoting *Holiday Tours*, 559 F.2d at 843 n.3).

143 *Id.* at 1067.

companies.[144] Thus, continued Emmis ownership of its existing television stations in accordance with the *status quo* cannot and would not cause a cognizable harm to other parties.

D. Granting the Interim Relief Will Serve the Public Interest

As explained above, in the absence of interim relief, Emmis would suffer substantial and irreparable harm by being forced to divest a television station before the fate of the duopoly rule is resolved. Indeed, denying the requested relief would force Emmis to comply with a rule that has been found arbitrary and capricious, and may never be revived in its current form (or otherwise). By contrast, were the interim relief to be granted, no off-setting harms would be suffered by the Commission, interested parties, or the public. Currently, the station is being managed by a responsible and trustworthy owner, with a long and illustrious history of service in the public interest. Accordingly, the public interest would be served by extending the time Emmis has to come into compliance with the duopoly rule, which would merely maintain the *status quo* during the pendency of review proceedings.

E. A Grant of the Requested Relief Is Consistent with Commission Precedent

The Commission has granted similar relief to parties subject to divestiture requirements in the past. Most recently, the Commission granted Viacom interim relief from a requirement to divest broadcast stations to come into compliance with the national ownership cap.[145] As with Emmis, Viacom requested interim relief without the presence of an actual proceeding on the merits of the rule—only a court-ordered remand. Given the D.C. Circuit remand in *Fox* and the biennial review standard announced therein, the Commission granted interim relief for the "period of time to come into compliance following the Commission's reexamination of the [rule]

[144] 559 F.2d at 843 n.3.

[145] *Viacom Order*, FCC 02-98, 2002 Lexis 1594.

on remand."[146] Accordingly, the Commission gave Viacom until 12 months after a final ruling in a future national ownership cap proceeding to come into compliance with any national television ownership rule.

The Commission granted similar relief to AT&T in response to the D.C. Circuit's remand of the national cable ownership cap.[147] As part of the requirements imposed by the Commission to permit its merger with MediaOne, AT&T "irrevocably" elected to divest its interest in Time Warner Entertainment, Inc. in order to come into compliance with the national cable ownership rule. Even in the face of this irrevocable election, the Commission granted AT&T a stay of this requirement pending resolution of a then uninitiated rulemaking on remand.[148]

Courts and the Commission have long recognized the importance of treating similarly situated parties alike.[149] The FCC may not treat Emmis differently than it has treated AT&T and Viacom without adequately explaining its actions.[150] In so doing, the Commission must "do more than enumerate factual differences, if any . . . it must explain the relevance of those

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146 *Id.*

147 *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorization from MediaOne Group, Inc. to AT&T Corp.*, No. 01-95 (rel. Mar. 16, 2001) (Order).

148 *Id.*

149 *See, e.g., Crain Broad., Inc.*, 8 FCC Rcd 4406, 4408 (1993) (Memorandum Opinion and Order); *Ramon Rodriguez*, 3 FCC Rcd 407, 408 (1988) (Memorandum Opinion and Order). Moreover, the disparate treatment of similarly situated expressive media itself violates the First Amendment. In *Turner Broadcasting System, Inc. v FCC*, the Supreme Court warned that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." 512 U.S. 622, 659 (1994).

150 *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently."); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (noting that "cases have recognized successful equal protection claims ... where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and [where] there is no rational basis for the difference in treatment.").

differences to the purposes of the . . . Act."[151] In light of the weight of FCC precedent in favor of granting parties similar relief, the Commission should grant comparable relief in this case.

Accordingly, the Commission should grant Emmis a reasonable period following the conclusion of a rulemaking to come into compliance with a rule that, as a legal certainty, must be the subject of that proceeding.

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151 *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1995) (quoting *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965)).

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IV. CONCLUSION

For the foregoing reasons, the Commission should grant Emmis' request for interim relief to maintain the *status quo* by suspending the time for the company to come into compliance with the divestiture requirement until 12 months after the issuance of a final Commission decision on the *Sinclair* remand and the 2002 biennial review proceeding.

Respectfully submitted,

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May 6, 2002

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

RECEIVED

MAY - 6 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's	)	
Regulations Governing Television	)	MM Docket No. 91-221
Broadcasting: Television Satellite	)	MM Docket No. 87-8
Stations Review of Policy and Rules	)	

DECLARATION OF JEFFREY H. SMULYAN

Pursuant to 28 U.S.C. § 1746, Jeffrey H. Smulyan, under penalty of perjury, states as follows:

1. I am Chairman, CEO and controlling shareholder of Emmis Communications Corporation.

2. I have been involved in the broadcasting industry for more than 25 years.

3. I have personal knowledge of the facts stated in this declaration.

4. I have had extensive experience with the market for the acquisition of television stations in markets of varying size.

5. In my experience, individual network-affiliated VHF television stations are not often available for purchase. Each television station is highly unique, with differing technical characteristics and audiences that represent significant goodwill. If a station group owner were forced to divest such a station, there would be relatively little likelihood that that entity would be able to repurchase that station or purchase one that is comparable at a comparable price.

6. The forced divestiture of a station will usually result in below market pricing for the station.

7. Accordingly, the forced divestiture of a television station would, in all probability, prohibit that owner from owning that station again, unless the owner were willing to pay any price necessary.

8. I am intimately familiar with the economics of the Honolulu market and the impact of those economics on operation of television stations. Because of the number of stations in the market, the increased costs of operation in the market, and the condition of the local economy, the ability to combine operations of two stations would assist in achieving a reasonable level of profitability.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 3, 2002.

Jeffrey H. Smulyan

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2002, a copy of the foregoing Request of Emmis Communications Corporation for Interim Relief was delivered via overnight mail to the following:

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